

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-213009

DATE: July 26, 1984

MATTER OF: Small Business Systems, Inc.

DIGEST:

1. Where protester, by letter to procuring activity prior to the closing date for receipt of proposals, did not use the word "protest," but conveyed its dissatisfaction with a solicitation requirement and requested corrective action, protest submitted to GAO within 10 days of the issuance of solicitation amendment which responded to protester's objection but failed to cure it is timely under our Bid Protest Procedures.
2. Protester alleging that solicitation specification requiring a minimum of eight expansion slots for plug-in adapters on microcomputer systems unit is unduly restrictive bears burden of proof and must show that specification and agency's determination of its needs are clearly unreasonable. Protester's disagreement with agency's technical opinion does not establish that the requirement is unreasonable.
3. Protest against alleged impropriety in solicitation will not be considered where protester would not be eligible for award even if issue raised were decided in its favor because its product is otherwise nonconforming to the solicitation.
4. Protest against alleged impropriety in amended solicitation first raised over 8 months after the closing date for receipt for proposals is untimely under our bid protest procedures.

Small Business Systems, Inc. (SBS), protests request for proposals (RFP) No. 71-83-HHS-OS, issued by the Department of Health and Human Services (HHS), Office of the Assistant Secretary for Planning and Evaluation (ASPE), for microcomputers. Specifically, SBS alleges that the RFP requirement for a minimum of eight expansion slots for

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plug-in adapters on the systems unit (internal plugs used to install components) overstates the agency's minimum needs and, therefore, is unduly restrictive of competition. Award was made to United Terminals Inc. for IBM Personal Computers XT (XT).

A threshold matter raised by HHS concerns the timeliness of SBS's protest. HHS contends that SBS's protest is untimely because it concerns an alleged deficiency in the RFP, yet was not filed with our Office until several days after the closing date for receipt of proposals. In this regard, our Bid Protest Procedures require that a protest based on alleged improprieties in an RFP be filed with the contracting agency or this Office prior to the closing date for receipt of proposals 4 C.F.R. § 21.2(b)(1) (1983).

By letter prior to the closing date, SBS complained to the contracting activity that the requirement for a minimum of eight expansion slots for plug-in adapters is unduly restrictive and requested that the number be reduced. In response, HHS issued amendment No. 2 to the RFP, which failed to relax the requirement. Within 10 working days of the issuance of the amendment, SBS protested to this Office.

In its August 23 letter to the contracting activity, SBS did not use the word "protest." While it would have been preferable for SBS to have used the word "protest" in its letter to the agency, the firm's failure to do so is not decisive as to whether that letter can be considered an agency protest. Pitney-Bowes, Inc., B-200016, Dec. 30, 1980, 80-2 C.P.D. ¶ 448. In this regard, we have held that the intent to protest may be conveyed by a communication which lodges specific exceptions to a procurement procedure or by an expression of dissatisfaction and request for corrective action. Pitney-Bowes, Inc., B-200016, supra; Monarch Enterprises, Inc., B-208631, May 23, 1983, 83-1 C.P.D. ¶ 548; Diesel Parts of Columbia, B-200595, July 20, 1981, 81-2 C.P.D. ¶ 50.

We find that SBS's pre-closing-date letter constitutes a protest because it took exception to a mandatory RFP requirement and requested that the requirement be relaxed. HHS's issuance of amendment No. 2, which failed to cure the alleged deficiency, constituted initial adverse agency action. Therefore, the SBS protest to our Office filed within 10 working days of the issuance of the amendment is timely under our Bid Protest Procedures. 4 C.F.R. § 21.2(a) (1983).

Concerning the merits of the case, ASPE states that the design requirement for a minimum of eight expansion slots provides maximum flexibility to upgrade and replace basic functions and to add new options as they become available. In this regard, ASPE's technical experts explain that functions "built-in" to the systems unit which become obsolete can be replaced by state-of-the-art equipment through use of expansion slots. ASPE thus concludes that because the equipment will be used to meet ASPE's needs over the 5-year life of the equipment, the greater number of expansion slots gives reasonable assurance that functions which either are "built-in" to the systems unit or supported on expansion slots will be able to be upgraded or replaced, so that the system is not rendered prematurely obsolete in the rapidly changing technological environment.

SBS argues that the five expansion slots on the Texas Instruments Professional Computer (TIPC), which SBS offers, provide as much flexibility to add components as the eight slots on IBM's XT microcomputer because several functions which require or share an expansion slot on the IBM unit are "built-in" to the TIPC unit. SBS also disagrees with ASPE that "built-in" functions can readily be reassigned to expansion slots and, thus, maintains that its equipment provides essentially the same flexibility as an eight-slot unit.

The determination of an agency's minimum needs and how best to meet them consistent with the requirement for the broadest practicable competition primarily is the using agency's responsibility, in part, because the user is the one most familiar with the conditions under which the needs have arisen and have been met previously. London Fog Company, B-205610, May 4, 1982, 82-1 C.P.D. ¶ 418. We therefore will not question a restriction in a solicitation's specifications unless it is shown to be clearly unreasonable and, therefore, restrictive of competition. Moreover, the use of design specifications does not provide an automatic basis for determining that the RFP unduly restricts competition unless the design requirements are beyond the agency's minimum needs. Christie Electric Corporation, B-197481, Oct. 14, 1980, 80-2 C.P.D. ¶ 273; California Computer Products, Inc., B-193329, July 3, 1979, 79-2 C.P.D. ¶ 1.

Even though SBS charges that the requirement for a minimum of eight expansion slots is unduly restrictive, we do not find that the protester has carried the burden of proving its case. SBS concedes that equipment flexibility

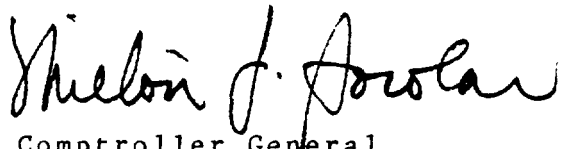
28918

is a legitimate agency concern. However, SBS asserts that the TIPC's five slots meet the agency's needs because that computer has several functions "built-in" to the system's unit for which other systems require expansion slots. ASPE's technical opinion is that the eight-slot system gives assurance that "built-in" functions which become obsolete will be able to be upgraded or replaced on expansion slots. Thus, ASPE's technical experts maintain that while a five-slot system may provide the required flexibility to add new components, the greater number of slots is needed so that "built-in" functions also can be replaced on expansion slots. While SBS questions ASPE's determination that certain "built-in" functions can be replaced on slots, it has not shown ASPE's technical opinion to be unreasonable. Therefore, we defer to the contracting agency's experts with respect to these opposite technical opinions. London Fog Company, B-205610, supra.

Further, we need not consider SBS's objection to the amended RFP requirement that the main memory board be capable of storing 192 kilobytes of random access memory because, even if we decided this in SBS's favor, the firm, by its own admission, would be ineligible for award under our above finding. Swintec Corporation et al., B-212395.2 et al., Apr. 24, 1984, 84-1 C.P.D. ¶ 466. In any event, since SBS did not protest this alleged impropriety until over 8 months after the closing date for receipt of proposals, its objection is untimely under our Bid Protest Procedures. 4 C.F.R. § 21.2(b)(1) (1983).

Finally, based on its interpretation of a trade publication article, SBS argues that only IBM manufactures equipment which meets all the RFP requirements. The procuring activity states that at least three manufacturers advertise systems which can meet the RFP requirements and the government reasonably expected adequate competition due to the large number of microcomputer dealers. While the record indicates that dealers offering another manufacturer's equipment were rejected apparently due to the failure to timely install a proposed modification, we cannot say that this establishes that only IBM could meet the RFP requirements. Cf. Rack Engineering Company, B-208615, Mar. 10, 1983, 83-1 C.P.D. ¶ 242; Gerber Scientific Instruments Company, B-197265, Apr. 8, 1980, 80-1 C.P.D. ¶ 263.

The protest is denied in part and dismissed in part.

for 
Comptroller General
of the United States